IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 47

GEORGE E. HICKMAN, as Administrator of the Estate of Norman E. Hickman, deceased,

Petitioner,

against

JOHN M. TAYLOR and GEORGE H. ANDERSON, individually and trading as TAYLOR & ANDERSON TOWING AND LIGHTERAGE COMPANY,

and

BALTIMORE & OHIO RAILROAD CO.

JOHN M. TAYLOR, GEORGE H. ANDERSON and SAMUEL B. FORTENBAUGH, JR.,

Respondents.

PETITION FOR PERMISSION TO FILE BRIEF AMICUS CURIAE, AND BRIEF AMICUS CURIAE

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PETITION FOR PERMISSION TO FILE BRIEF AMICUS CURIAE

To the Honorable Chief Justice and Associates Justices of the Supreme Court of the United States:

The undersigned, as general counsel for the National Maritime Union of America, respectfully petitions this Honorable Court for leave to file the accompanying brief

amicus curiae with the consent of the attorneys for the petitioner and respondents.

Your petitioner has read the petition of George E. Hickman and the brief submitted by his attorneys in support of the petition for writ of certiorari and endorses the arguments and reasons therein set forth.

The National Maritime Union of America alleges that it is an unincorporated membership organization, organized and existing under and by virtue of the laws of the State of New York, for the purpose of improving the conditions of workers employed in the American Merchant Marine. It has a membership of more than 90,000 seamen. Having written collective bargaining agreements with more than 125 private companies, it maintains branches in all of the principal ports along the Atlantic, Gulf and Pacific coasts including a branch in Puerto Rico and Hawaii.

The members of the petitioning union are engaged in a hazardous occupation. Various members of the National Maritime Union and their families have employed the undersigned to represent them in proceedings filed in the United States District Courts to recover damages for their personal injuries or death. Notwithstanding the protection afforded seamen under the law, substantive rights have frequently been nullified through the inability to discover the facts necessary for the proof of their claims. Statements from witnesses to an accident are promptly taken by ship officers or the claim agents of the shipowner. These witnesses, however, have frequently dispersed to unknown ships or ports and are unavailable to the injured seaman by the time he is sufficiently recovered to investigate the cause of his accident. The proof that the vessel was unseaworthy or machinery unserviceable or that the shipowner had prior notice of a dangerous condition is too often effectively buried in the files of the employer's agents or attorneys.

The purpose of the Federal Rules of Civil Procedure to ameliorate this unequal status is now threatened by the decision of the Circuit Court in the instant case. Unless reversed, the modernization of our legal procedure will have sustained a serious setback. Corporate defendants and insurance companies may find it to their advantage to maintain a proprietary interest in the facts they have uncovered. Seamen and employees generally, however, are vitally concerned that this Court reaffirm the principle that litigants shall have equal access to the facts regardless of the source.

It is understood that railroad and insurance companies will petition this Honorable Court for leave to file briefs amicus indicating the viewpoint of employer organizations. It is appropriate, therefore, that a labor organization be granted a similar opportunity to be heard on the important question before this Court.

The petitioner desires, also, to comment upon the amendment recently proposed by the Advisory Committee to revise the scope of discovery under the Federal Rules. This amendment goes far beyond the decision of the Circuit Court and its effect is virtually to deprive employees of the right to discovery altogether.

WHEREFORE, your petitioner respectfully petitions this Honorable Court for leave to file the accompanying brief amicus curiae, and that the decision of the Circuit Court should be reversed.

William J. Rainey

Attorney for Petitioner,
Office & P. O. Address,
291 Broadway,
New York City.

STATE OF NEW YORK,
CITY OF NEW YORK, } ss.:
COUNTY OF NEW YORK,

WILLIAM L. STANDARD, being duly sworn, deposes and says that he is the attorney for the petitioner named in the foregoing petition; that he has read the same, and knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

William L. Standard

Sworn to before me this
9th day of October, 1946.

Notary Public:
Kings Co. Clk's No. 150.
N. Y. Co. Clk's No. 720.
Commission Expires March 30, 1948.

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Respondents.

BRIEF OF AMICUS CURIAE

Preliminary Statement

There is an important question of law in the *Hickman* case which directly affects the rights of seamen. Many of them are members of the National Maritime Union as stated in the petition and many of them have suits pending in various courts throughout the United States to recover damages for injuries sustained on board ship.

The Court below has held that statements of third persons taken by attorneys are exempt from the discovery provisions of the Federal Rules. This decision cannot be justified either under law, logic or public policy. To uphold it means to nullify the basic intendment of the Federal Rules and foster the unequal administration of justice among persons.

POINT I

To extend attorney-client privilege to statements of third persons is to defeat the purpose of discovery under the Federal Rules.

The *ratio decidendi* of the Circuit Court decision is that "* * * 'privilege' as the term is used in the Federal Rule and 'privilege' as one finds the term in the law of evidence as a ground for excluding testimony are not identical."[1] This specific question cannot be adjudicated, however, without necessarily construing the scope of the rules generally. For if the investigation file of an attorney is sanctified, should not a similar exemption be granted the statements obtained by an investigator employed in the attorney's office, the office of the claim department of the corporation, or the claim agent of the insurance company? Conversely, should the lawyer alone be granted a monopoly of immunity, is it to be doubted that steamship, railroad, utility, insurance companies and the like immediately would delegate their attorneys to perform all investigations?

But what would otherwise enlarge the responsibility of the legal profession would not necessarily serve the best interests of the injured employee, his widow and family, or the indigent individual either unable to afford the services of an attorney or unaware of the necessity of an immediate retainer.

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[1] *Hickman* v. *Taylor*, 154 F. 2d 212, 222.

To exclude from discovery statements of third persons without regard to who obtained them, or to limit the exclusion only to statements obtained by an attorney, would serve merely to accentuate the basic disparity between corporate defendants and insurance companies over individuals in their respective opportunities to investigate and prepare for litigation. The lawsuit would continue to be a game of chance in a sports arena between unequal contestants. In either event affirmance of the decision below would defeat the basic premise of the rules that "the guiding principle is the broad conception of the rules that discovery of all matters relevant to a suit should be allowed to the fullest extent consist with the orderly and efficient functioning of the judicial process."[2]

Aside from considerations of policy, it is difficult to reconcile the decision of the Circuit Court with its reasoning. The conclusion is actually *non sequitur*. The Court found that under Rules 26 and 33 a party could properly demand a copy of a memorandum in connection with an interrogatory.[3] It approved the reformulation of the rule of discretion by the District Court that "unless, under the circumstances of any particular case, the Court is satisfied that the administration of justice will be in some way impeded, discovery will be granted when asked."[4]

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[2] *Hickman* v. *Taylor*, 4 F. R. D. 479, 481.

[3] Supra, p. 216.

[4] Ibid., p. 216. The District Court was of the opinion that the rule of discretion as quoted applied to all the discovery rules (supra, p. 481). The Circuit Court disagreed that it applied to Rule 34 because of the affirmative requirement that good cause be shown (p. 216). It is submitted that the framers of the rules intended no substantive difference in the scope of Rules 26 to 34; and that the differences in language are unsubstantial. Thus, despite the silence of Rule 33, the Circuit Court held that Rule 33 was subject to the same privilege limitation as Rules 26 and 34 (Ibid. p. 221). Though the Advisory Committee recommends a different rule of discretion (discussed in Point II), it nevertheless has proposed a series of amendments making explicit that the "Rules governing depositions are also made expressly applicable to the production of documents." Report of the Advisory Committee, 156 F. 2d XIX, XXXIV.

It was conceded that an attorney had no property right in the information which he "digs up about the client's case and has in his possession";[5] that the fruits of an attorney's diligence could be shared;[6] that the "fishing expeditions" by an opponent's lawyer were no longer objectionable because the Rules "are intended to go far in making information known to one party available to the other."[7] It quotes with approval the two guiding principles:

> "First, every party to a litigation is entitled to secure all evidence, information and documents, germane to the issues, even if they are in possession of an adverse party.
>
> "Second, such evidence, information and documents should be made available before the trial. The purpose is not only to facilitate the obtaining of evidence for use at the trial, but also to reduce the element of surprise to a minimum and shorter trials."[8]

It is granted further by the Circuit Court that the admissibility of documents in evidence is not the test in discovery proceedings;[9] that all the Rules of Discovery are subject to the same limitations of privilege;[10] that the term "privilege" if interpreted in its evidentiary sense would apply only to confidential statements made by a client to his lawyer, and that thus construed the statements demanded by the petitioner are not privileged because the statements were obtained from third persons.[11] It is also admitted that lawyers' files are not impregnable against

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[5] Ibid. p. 216.

[6] Ibid. p. 218.

[7] Ibid. p. 217.

[8] Ibid. p. 217, quoting Justice Holtzoff, New Federal Procedure in the Courts, 1940, published by the American Bar Association, p. 70.

[9] Ibid. pp. 217-218.

[10] Ibid. p. 221.

[11] Ibid. p. 222.

any inquiry from outside because "that depends upon what the lawyer puts in them. A piece of a machine which has hurt someone, *a document needed to show a fact*, many things required in a lawsuit find their way from client's hands to lawyer's file and are not to be concealed until the day of trial for that reason."[12]

The foregoing notwithstanding, the Court nevertheless holds that the requested statements need not be produced. Two reasons are assigned:

(a) As a matter of policy it would weaken the attorney-client relationship and prevent undivided allegiance if disclosure could be compelled of "intangible things, the results of the lawyer's tongue, pen and his head, for his client", i.e., the "work product" of the lawyer.[13]

(b) As a matter of law, the term privilege as used in the Rules has a broader meaning than testimonial exclusion and extends to "the work product" of a lawyer such as the statements in question.[14]

It is respectfully submitted that neither argument is tenable. If it be conceded that an attorney can be compelled to produce "a piece of machine which has hurt someone" or "a document needed to show a fact", no distinction in principle can be made in the case of facts contained in statements obtained from third persons. The contingency that an attorney might be called to contradict a witness because of a statement theretofore obtained by the attorney cannot be deemed to contravene the spirit of the Canons of Ethics. Any such testimony by the attorney would not be voluntary. It would be "essential to the ends of justice."[15] The testimony of the attorney would relate

[12] Ibid. p. 223.

[13] Ibid. pp. 220, 223.

[14] Ibid. p. 223.

[15] Canons of Ethics, Appearance of Lawyer as Witness for His Client: "* * * * Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client."

not to intangibles but to facts concerning which the client himself could not claim privilege. The attorney would not be disclosing his professional opinion or advice. He would be simply a medium through which his client, originally, and now the Court, could become apprised of the true facts. His status before the Court would be the same as that of any other investigator or witness in possession of facts necessary for a fair adjudication of an issue. Except, perhaps, in the limited instances of confidential communications between lawyer and client, the attorney has never been privileged to conceal facts from the Court. In no case can he condone perjury by his silence. The concern of the Court below at possible abuse occasioned by "the impact of the Rules for discovery when they affect the lawyer-client relationship", therefore, is exaggerated. Ample remedy to prevent abuse is afforded under Rules 30(b), (d), 31(d), 33 and 34. Under these provisions for the protection of parties and deponents, the Court may exercise its discretion in any instance where discovery would impinge upon confidential communications or the professional opinion of an attorney.

Neither is the Court below on sound ground when it extends the application of the term "privilege" as used in the Federal Rules beyond the testimonial privilege afforded attorney and client. The cases cited and relied on by the Court do not support its position.[16] The law has always permitted resistance to discovery as well as testimony where self-incrimination or secrets of state were affected. When applied to the attorney-client relationship, however, the cases have consistently limited the privilege to direct communications between attorney and client. Communications between attorney or client and third persons have never been protected. This is conceded by the Court.

To assume, therefore, that because incriminatory statements or "statements injurious to public interest" may be

[16] Ibid. p. 222, ftn. 16.

excluded from discovery, the Court is justified in enlarging the content of the term "privilege" as it affects lawyer-client communications is *non sequitur.*

The decision of the Court in extending the meaning of the term "privilege" to include the work product of an attorney, and to include within the definition of "work product" statements obtained by an attorney from third persons, is, therefore, a gratuitous amendment of the Rules which was never intended by the framers.

In this connection it is significant to point out that in its last report the Advisory Committee commenting on the instant case criticized the conclusion of the Court below. It states:[17]

> "The Committee criticizes the decision and opinion in Hickman v. Taylor. * * * The Committee believes that the term 'privileged' as used in that rule was not designated to include anything more than that imposed within the rule of testimonial exclusion regarding privileged communications developed under the applicable laws of evidence, by common-law and statutory."

POINT II

The amendment proposed by the Advisory Committee to revise the scope of discovery is unsound and should be rejected.

Going beyond the limited issue of privilege in the instant case, the opportunity is here taken to comment upon the amendment proposed by the Advisory Committee to revise the scope of discovery. The proposed amendment reads as follows:

> "The courts shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial

[17] Report of the Advisory Committee, supra, p. XXXV.

unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice. The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinion, or legal theories, or, except as provided in Rule 35, the conclusions of an expert."[18]

The amendment is proposed to avoid the consequences of the Circuit Court decision with the rationale of which the Advisory Committee disagrees, and as a compromise between complete exclusion and complete discovery.[19] The proposed amendment, however, shuts the door to discovery even more effectively than does the decision appealed from. Whereas the Circuit Court would exclude from discovery only statements prepared by an attorney, the amendment would exclude statements whether obtained or prepared by the party, his attorney, surety, indemnitor or agent.

Furthermore, placing the burden of proof upon the discoverer to show that the denial of relief would cause hardship and injustice is virtually tantamount to complete exclusion. Ignorant of the facts, the party seeking discovery will not be able to particularize his demand, and his appeal to the Court would necessarily be couched in unpersuasive generalization.

The amendment finally violates the spirit of the Rules. The emphasis is not on "granting the widest latitude in ascertaining before trial facts concerning the real issue in dispute",[20] but rather in limiting such relief to exceptional cases.

It should be pointed out that the Circuit Court rejected a negative formulation of a right to discovery and adopted the formulation of the District Court that "unless, under the circumstances of any particular case, the Court is

[18] Ibid. p. XXXVI.

[19] Ibid. p. XXXVI.

[20] *Nichols v. Sunborn Company*, 24 Fed. Supp. 908, 910.

satisfied that the administration of justice will be in some way impeded, discovery will be granted when asked."[21]

The amendment proposed by the Advisory Committee, therefore, does not contribute to the solution of the proper scope of discovery and should be rejected.

The Rules as presently drawn require no amendment other than one to make explicit that the Rules governing depositions are expressly applicable to the production of documents and that the scope of discovery whether by deposition, interrogatory or demand for the production and inspection of original documents shall for all three be the same.

Thus formulated the fundamental purpose of the Rules can be achieved. Litigants would have the unlimited right to discovery of relevant, non-privileged material in the possession of their adversaries. The burden of proof to show abuse, hardship or injustice would rest upon the possessor of the material. In any proper case the discretion of the Court could be invoked under the available rules for the protection of the parties and deponents.

CONCLUSION

The decision of the Circuit Court should be reversed.

Respectfully submitted,

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EDWARD J. MALAMENT,
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[21] Supra, ftn. 4.